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# COMMANDEERING, THE TENTH AMENDMENT, AND THE FEDERAL REQUISITION POWER: *NEW YORK v. UNITED STATES* REVISITED

*Erik M. Jensen\* and Jonathan L. Entin\*\**

In *New York v. United States*,<sup>1</sup> which articulated the Supreme Court's current approach to the Tenth Amendment,<sup>2</sup> Justice O'Connor's majority opinion relied heavily on original understanding. "[T]he question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers,"<sup>3</sup> wrote O'Connor, and all the justices seemed to agree on the most significant historical point: the founders generally thought that the national government should not be issuing orders to the states. That understanding led to the conclusion, accepted by six members of the Court, that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>4</sup>

On the last day of the 1996-97 term, the Court announced its decision in yet another Tenth Amendment case, *Printz v. United States*.<sup>5</sup> The Court once again immersed itself in history, this time analyzing several numbers of *The Federalist*<sup>6</sup> on the way

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1. 505 U.S. 144 (1992).

2. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

3. *New York*, 505 U.S. at 163.

4. *Id.* at 188. Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas joined the O'Connor opinion in full. Justices Stevens, White, and Blackmun concurred in the historical section, but each dissented from the Court's decision.

5. 117 S. Ct. 2365 (1997).

6. Indeed, dissenting Justice Souter wrote that "it is *The Federalist* that finally determines my position." *Id.* at 2402 (Souter, J., dissenting).

to determining whether the national government could command state executive officers to participate in a federal regulatory scheme. Justice Scalia, for a five-justice majority, characterized *Printz* as a relatively straightforward application of *New York*:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory system. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary . . . .<sup>7</sup>

Although some of the *New York* language was quite broad—two *Printz* dissenters characterized it as dictum<sup>8</sup>—that language was elevated to the level of a per se rule.<sup>9</sup>

The *New York* Court was right that the Constitution was intended to dramatically change the role of the states in the national government; we doubt that anyone would seriously dispute that point. It is also a matter of historical record—Justice O'Connor marshalled many pithy quotations to this effect—that many founders questioned the propriety and practicality of federal orders directed to state governments.<sup>10</sup>

But the Court may well have gotten the original understanding wrong by reading too much into the historical evidence presented to it. Questions of propriety are not the same as questions of constitutionality; as Justice Powell once observed, "Misguided laws may nonetheless be constitutional."<sup>11</sup> When, in

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7. Id. at 2384. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined the Scalia opinion. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

8. See, e.g., id. at 2398 (Stevens, J., dissenting); id. at 2404 (Souter, J., dissenting).

9. Justice Scalia wrote: "We . . . conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'" Id. at 2383 (quoting *New York v. United States*, 505 U.S. at 188).

10. *New York*, 505 U.S. at 163-66.

11. *James v. Strange*, 407 U.S. 128, 133 (1972). See also Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 Admin. L. Rev. 31, 56-59 (1991); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 Ohio St. L.J. 175, 224-26 (1990). The Supreme Court has repeatedly recognized the distinction between a statute's wisdom and its constitutionality, both in cases where a law has been upheld and in cases where it has

*Printz*, Justice Scalia quoted James Madison to the effect that "[t]he practicability of making laws, with coercive sanctions, for the States as political bodies had been exploded on all hands,"<sup>12</sup> the Justice elevated Madison's practical point to a principle of constitutional law. Perhaps the national government ought to restrain itself from compelling states to participate in national regulatory schemes, but it is not clear that the Constitution *requires* that result.<sup>13</sup>

We shall present evidence in one substantive area, taxation, that we think undercuts the intellectual basis for both *New York* and *Printz*: many founders (including Alexander Hamilton) believed that the discredited revenue system of the Articles of Confederation, under which funds were requisitioned from the states, survived ratification of the Constitution. In theory at least, requisitions represented a significant exercise of federal power: the national government could order each state to supply a predetermined amount of revenue to the national treasury. What could be a clearer application of national power than mandating that state governments collect and send millions—or, if we adjust eighteenth-century figures to reflect modern revenue needs, billions—of dollars to the nation's capital?

To be sure, the justices in *New York* and *Printz* didn't ignore issues of taxation. One of O'Connor's pithy quotes dealt with the requisitions system,<sup>14</sup> although no significance was attached to that fact, and sizeable chunks of several *Printz* opinions considered whether the national government has the power to use state officials to administer federal revenue statutes.<sup>15</sup> But even the dissenting justices missed the key point that was staring them in the face: the historical materials they studied assumed—and in one case made explicit—that requisitions, however ineffi-

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been struck down. See *Turner Broadcasting Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1197 (1997); *INS v. Chadha*, 462 U.S. 919, 944 (1983); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952); *Edwards v. California*, 314 U.S. 160, 173 (1941); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447-48 (1934).

12. Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* at 9 (July 14, 1787) (Yale U. Press, 1937) ("Records").

13. See *Printz*, 117 S. Ct. at 2393 (Stevens, J., dissenting) ("The Court's evaluation of the historical evidence . . . fails to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution.").

14. See text accompanying note 37.

15. See *Printz*, 117 S. Ct. at 2372-73 (Scalia, J.); *id.* at 2389-94 (Stevens, J., dissenting); *id.* at 2401-04 (Souter, J., dissenting).

cient and otherwise undesirable they might have been, survived as a constitutional matter.<sup>16</sup>

Our argument proceeds as follows. After we outline the constitutional history set out in *New York* and *Printz*, we explain why the results in those cases are superficially supported by the history of requisitions: the Constitution created a system of indirect and direct taxation to serve as the sources of revenue; it contains no mention of requisitions; and several proposed amendments that would have preserved a specific role for requisitions went nowhere. In the last section of the article, however, we present the evidence that requisitions did not disappear from national revenue possibilities—evidence that is perfectly consistent with the distaste of many founders for the requisitions process.

## I. THE CONSTITUTIONAL HISTORY IN *NEW YORK* AND *PRINTZ*

For much of the nation's history, the Tenth Amendment was viewed as a substantive limitation on federal power. That provision was an important part of the background against which the Supreme Court decided such landmark cases as *McCulloch v. Maryland*<sup>17</sup> and *Gibbons v. Ogden*.<sup>18</sup> As the results in these cases suggest, invocation of the Amendment was no guarantee of success for opponents of federal legislation.<sup>19</sup> Nevertheless, the Tenth Amendment provided part of the Court's rationale for striking down federal laws in such decisions as *The Civil Rights Cases*,<sup>20</sup> *Hammer v. Dagenhart*,<sup>21</sup> *A.L.A. Schechter Poultry Corp. v. United States*,<sup>22</sup> and *Carter v. Carter Coal Co.*<sup>23</sup>

The Court's ultimate acceptance of the New Deal implied a very different attitude toward Tenth Amendment claims. For

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16. See, e.g., Federalist 36 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 217, 220-21 (Mentor, 1961) ("*The Federalist*"), quoted and discussed in notes 91-92 and accompanying text. At least one commentator has made the same error. See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 1971-88 (1993).

17. 17 U.S. (4 Wheat.) 316, 406-07 (1819).

18. 22 U.S. (9 Wheat.) 1, 197-98 (1824); see also *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (noting that it was "universally understood" that the Bill of Rights was intended to prevent abuses by the federal government only).

19. Other examples of cases in which Tenth Amendment arguments were rejected include *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *McCray v. United States*, 195 U.S. 27, 61 (1904); and *Champion v. Ames*, 188 U.S. 321, 357 (1903).

20. 109 U.S. 3, 15 (1883).

21. 247 U.S. 251, 274-76 (1918).

22. 295 U.S. 495, 528-29 (1935).

23. 298 U.S. 238, 293-95 (1936).

nearly four decades after 1937, the conventional wisdom reflected Justice Stone's observation in *United States v. Darby*<sup>24</sup> that "[t]he amendment states but a truism that all is retained which has not been surrendered."<sup>25</sup> Although *Darby* signaled that the Court no longer viewed the Tenth Amendment as providing enforceable limits on the overall scope of federal authority, the 1976 decision in *National League of Cities v. Usery*<sup>26</sup> suggested that the amendment might shield the states (but not private parties) from some regulatory measures emanating from Washington. In that case a closely divided Court ruled that the Tenth Amendment precluded the federal government from regulating the states in ways that interfered with their performance of traditional governmental functions.<sup>27</sup> *National League of Cities* involved the application of the Fair Labor Standards Act to employees of state and local governments. There followed a series of decisions in which the Court refined its constitutional test but rejected Tenth Amendment challenges to other general regulatory measures that incidentally affected the states.<sup>28</sup>

After this series of cases, *National League of Cities* might have seemed aberrant, and indeed it was overruled only nine years later. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>29</sup> the Court rejected the traditional-governmental-functions test as unworkable and declared that federalism concerns were generally better addressed in the political than in the judicial arena. But four justices dissented in *Garcia*; two explicitly predicted that the issue would return to the Court and that the outcome would eventually be very different.<sup>30</sup> The first step in that direction came in *Gregory v. Ashcroft*,<sup>31</sup> where the Court

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24. 312 U.S. 100 (1941).

25. *Id.* at 124.

26. 426 U.S. 833 (1976).

27. That ruling drew on dicta and separate opinions in several post-New Deal decisions. See, e.g., *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (despite *Darby*, Tenth Amendment "is not without significance"); *Maryland v. Wirtz*, 392 U.S. 183, 201-05 (1968) (Douglas, J., dissenting); *New York v. United States*, 326 U.S. 572, 582 (1946) (noting the existence of "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations" that might be immune from federal regulation).

28. See *EEOC v. Wyoming*, 460 U.S. 226 (1983) (Age Discrimination in Employment Act); *FERC v. Mississippi*, 456 U.S. 742 (1982) (Public Utilities Regulatory Policies Act); *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982) (Railway Labor Act); *Hodel v. Virginia Surface Mining Ass'n*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act).

29. 469 U.S. 528 (1985).

30. *Id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

31. 501 U.S. 452 (1991).

noted Tenth Amendment concerns in suggesting that Congress must clearly express its intention to apply federal regulatory statutes to the states. The next step came the following year in *New York v. United States*,<sup>32</sup> where the question was no longer whether the federal government could apply otherwise permissible measures to the states as well as to private actors, but rather whether the federal government could regulate the states directly by passing laws aimed exclusively at state governments.

#### A. *NEW YORK V. UNITED STATES*

The narrow holding of *New York v. United States* is that Congress may not order states either to take title to radioactive waste or to regulate the disposal of such waste. Neither directive standing alone would pass constitutional muster, said a majority of the Court—coercing the states in such a manner was impermissible—and a “choice between two unconstitutionally coercive regulatory techniques is no choice at all.”<sup>33</sup>

In her opinion for the Court, Justice O'Connor looked to the founders' understanding of the relationship between the national government and the state governments. O'Connor's mini-history described the battle at the Constitutional Convention between adherents of two very different conceptions of what the national government should be. The New Jersey Plan, introduced by William Paterson, saw the national government operating directly on state governments, as was true under the Articles of Confederation. In contrast, the Virginia Plan, introduced by Edmund Randolph, rejected the structure of the Articles—had the Articles worked, there would have been no need for a constitutional convention—and saw the national government necessarily operating directly on individuals.<sup>34</sup>

The Virginia Plan, in modified form, prevailed. Wrote O'Connor, “[T]he Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States.”<sup>35</sup> And O'Connor's lengthy series of quotations is evidence of many founders' understanding that, in the words of Rufus King, “[l]aws, to be effective . . . must not be laid on states, but upon individuals.”<sup>36</sup>

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32. 505 U.S. 144 (1992).

33. *Id.* at 176.

34. *Id.* at 163-66.

35. *Id.* at 165.

36. Jonathan Elliot, ed., 2 *Debates on the Adoption of the Federal Constitution* 56

For present purposes, the most telling quotation comes from Alexander Hamilton, who, in urging support for the Constitution at the New York ratifying convention, stressed the futility of requisitions as the foundation of the national revenue system:

But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible. Then we are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do.<sup>37</sup>

To the *New York* majority, the lesson of history was straightforward: the Constitution extended the national power over individuals—on that point everyone agreed—and it simultaneously contracted the power that existed under the Articles to order states to obey national directives. But the idea that an extension of power over individuals required a contraction of power over the states is hardly obvious. And it is the proposition that a nationalist Constitution could have been intended to *reduce* national power in some respects that dissenting justices in *New York* found so counterintuitive.<sup>38</sup>

#### B. *PRINTZ V. UNITED STATES*

In *Printz*, too, founding-era history was controlling. *Printz* considered whether the national government could order chief law enforcement officers of local jurisdictions to perform background checks on would-be purchasers of firearms, an interim obligation imposed by the so-called Brady Act until the national government could get its own checking system into operation.<sup>39</sup> Although the Brady Act program seems to have been a rela-

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(Jonathan Elliot, 1845) ("*Debates*") (speaking at Massachusetts ratifying convention), quoted in *New York*, 505 U.S. at 165.

37. *Id.* at 233 (June 20, 1788), quoted in *New York*, 505 U.S. at 165-66.

38. [T]he Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on State sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.

*New York*, 505 U.S. at 210 (Stevens, J., dissenting).

39. The full name is the Brady Handgun Violence Prevention Act; the invalidated provision can be found at 18 U.S.C. § 922(s)(2) (1994).



tively small, indeed trivial, incursion on state sovereignty, the *Printz* majority thought *New York* was controlling: Tenth Amendment prohibitions could not be avoided by bypassing state legislatures and issuing orders directly to state executive officials.<sup>40</sup>

Much of the historical discussion in *Printz* dealt with what dissenting Justice Stevens called the “remarkably similar . . . question, heavily debated by the Framers of the Constitution, whether the Congress could require state agents to collect federal taxes.”<sup>41</sup> As we discuss in Part II, the new national government was going to have its own revenue system that could operate directly on individuals, and it would need officials to administer that system. Would those officials be new federal agents or would existing state and local bureaucrats do the work? Unlike *New York*, where there was general agreement about the grand patterns of the founding, the justices in *Printz* divided sharply on the original understanding of this narrow issue.

All justices agreed—they had to—that founding-era evidence suggests that it would often make sense for the national government to use the administrative apparatuses of the states and localities. For example, when antifederalists expressed concern that the national government might send “a swarm of revenue and excise officers to pray [sic] upon the honest and industrious part of the community,”<sup>42</sup> Alexander Hamilton responded, in Federalist 36, that at least in some cases Congress would probably “make use of the State officers and State regulations for collecting” federal taxes.<sup>43</sup> And James Madison, in Federalist 45, agreed: “the eventual collection [of revenue] under the immediate authority of the Union, will generally be made by the

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40. Of the four dissenters, Justices Stevens, Ginsburg, and Breyer (only Stevens had been a part of the *New York* Court) apparently concluded that both *New York* and *Printz* were wrongly decided. Justice Souter, who had sided with the *New York* majority, thought the two cases could be distinguished, and he adhered to *New York*'s result, if not to all of its language. See *Printz*, 117 S. Ct. at 2404 (Souter, J., dissenting):

I continue to agree . . . that Congress may not require a state legislature to enact a regulatory scheme and that *New York v. United States* . . . was rightly decided (even though I now believe its dicta went too far toward immunizing state administration as well as state enactment of such a scheme from congressional mandate).

41. *Id.* at 2386 (Stevens, J., dissenting).

42. *Essays of Brutus*, N.Y. J. (Dec. 13, 1787), reprinted in Herbert J. Storing, 2 *The Complete Antifederalist* 388, 390 (U. of Chicago Press, 1981), quoted in *Printz*, 117 S. Ct. at 2390 n.5 (Stevens, J., dissenting).

43. *The Federalist* No. 36, at 221 (Hamilton) (cited in note 16); see text accompanying note 52 (containing a longer quotation from Federalist 36).

officers, and according to the rules, appointed by the several States."<sup>44</sup>

The *Printz* majority concluded that those quotations by themselves meant very little. Justice Scalia wrote that "none of these statements [in *The Federalist*] necessarily implies . . . that Congress could impose these responsibilities *without the consent of the States*."<sup>45</sup> Thus, if national obligations were imposed on state executives, these had to be the result of agreements. And if state officers were convinced to do federal bidding, it would be because they would be paid by the national government, not because they would be commandeered.<sup>46</sup>

Balderdash, responded four dissenters, particularly Justices Stevens and Souter,<sup>47</sup> and, on the status of revenue collectors, the dissenters had the better of it. It is hard to read Federalist 27, 36, 44, and 45, the four papers focused on by several justices, as supporting the idea that a state could simply refuse to have its officials carry out any otherwise valid federal dictate.

The analytical progression begins with Federalist 27, in which Hamilton stated that the constitutional plan, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws."<sup>48</sup> Hamilton went on to state that "the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the

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44. *The Federalist* No. 45, at 292 (Madison) (cited in note 16).

45. See *Printz*, 117 S. Ct. at 2372.

46. *Id.* at 2374.

47. "Balderdash," if anything, understates the extent of the heat generated by the exchanges in *Printz*. Justice Stevens, for example, used language such as "[n]o fair reading of [the relevant Federalist Papers] can justify such an interpretation," *id.* at 2390 (Stevens, J., dissenting), and "[b]ereft of support in the history of the founding," *id.* at 2391, to describe the Scalia opinion. When the *Printz* decision was announced, Stevens "took the highly unusual step of reciting lengthy excerpts from his dissent. His voice quavered at times as he blasted the court for departing from tradition and crippling the 'machinery of government.'" Edward Felsenthal, *In Blockbuster Cases, Justices Rule for Restraint*, Wall St. J. at B1 (June 30, 1997).

48. *The Federalist* No. 27, at 176 (Hamilton) (cited in note 16), quoted in *Printz*, 117 S. Ct. at 2372 (Scalia, J.), 2389 (Stevens, J., dissenting), 2402 (Souter, J., dissenting). To Justice Stevens, that unquestionably meant that the "federal government was to have the power to demand that local officials implement national policy programs," *Printz*, 117 S. Ct. at 2389, thereby avoiding the difficulties of "a central government that could act only directly 'upon the States in their political or collective capacities.'" *Id.* at 2390 (quoting *The Federalist* No. 27, at 176 (Hamilton) (cited in note 16)).

enforcement of its laws.”<sup>49</sup> As Justice Souter put it, “I cannot persuade myself that the statements from No. 27 speak of anything less than the authority of the National Government, when exercising an otherwise legitimate power (the commerce power, say), to require state ‘auxiliaries’ to take appropriate action.”<sup>50</sup>

The incorporation-of-state-officials position is reinforced, Justice Souter suggested, by Madison’s discussion in Federalist 44 of the oath requirement:

[T]he “auxiliary” status of the state officials will occur because they are “bound by the sanctity of an oath.” . . . [In Federalist 44 Madison] asks why state magistrates should have to swear to support the National Constitution, when national officials will not be required to oblige themselves to support the state counterparts. His answer is that national officials “will have no agency in carrying the State Constitutions into effect. The members and officers of the State Governments, on the contrary, will have an essential agency in giving effect to the federal Constitution.”<sup>51</sup>

To those general principles add the learning from Federalist 36 and 45, and the result is fairly clear. In particular, in Federalist 36 Hamilton set out his understanding at some length:

[T]here are two cases in which there can be no room for double sets of officers: one, where the right of imposing the tax is exclusively vested in the Union, which applies to the duties on imports; the other, where the object had not fallen under any State regulation or provision, which may be applicable to a variety of objects. In other cases, the probability is that the United States will either wholly abstain from the objects pre-occupied for local purposes, *or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expense in the collection, and will best avoid any occasion of disgust to the State governments and to the people.*<sup>52</sup>

The national government might not be able to order state officials to engage in activities outside their usual areas of responsibility, such as collecting imposts. But it makes perfect sense, ad-

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49. *The Federalist* No. 27, at 177 (Hamilton) (cited in note 16), quoted in *Printz*, 117 S. Ct. at 2373 (Scalia, J.), 2390 (Stevens, J., dissenting), 2402 (Souter, J., dissenting).

50. *Printz*, 117 S. Ct. at 2403-04 (Souter, J., dissenting).

51. *Id.* at 2402-03 n.2 (Souter, J., dissenting) (quoting *The Federalist* No. 27, at 177 (Hamilton) (cited in note 16), and *The Federalist* No. 44, at 287 (Madison) (cited in note 16)) (footnotes omitted).

52. *The Federalist* No. 36, at 221 (Hamilton) (cited in note 16) (emphasis added).

ministratively and economically, for the national government to make use of the already existing expertise of state officials.

The last few words quoted above from Federalist 36 suggest why the *Printz* majority's insistence that formal agreement is necessary if state officials are to be used to implement national policies is almost certainly wrong: the founders would have thought formal agreement to be just that, a formality. Use of state officials was supposed to be *beneficial* to the states and their citizens (at least as long as Uncle Sam picked up the tab<sup>53</sup>): by making federal tax collectors unnecessary, it would temper the federal power, and make federal taxation more acceptable to the populace—avoiding “any occasion of disgust.”<sup>54</sup> If you as defender of states rights are worried about intrusions by the national government, would you rather have the national laws enforced by a swarm of new national officials or by your friends and neighbors—many of whom might also be dubious about national power?

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Nevertheless, only four justices concluded that the historical record supported state officials' administering federal tax statutes without formal agreement. And, to be fair to the *Printz* majority, their conclusion is consistent with the tenor of *New York*, that the *federal* government should be legislating and administering any federal revenue system. It is the result in *New York* that distorted the analysis in *Printz*; we need to reexamine the historical basis for the result in the older case. All of which brings us back to the question of the national government's power to requisition funds from the states.

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53. Whether payments to the states are constitutionally required or not, they might very well make sense to facilitate public policy. On the constitutional point, several justices read Federalist 36 as requiring that state officials be compensated for any federal enforcement activities. To that effect Justice Scalia quoted Hamilton's discussion of the way to “turn the tide of State influence into the channels of the national government”: “employ the state officers as much as possible, and . . . attach them to the Union by an accumulation of their emoluments.” *The Federalist* No. 36, at 222 (Hamilton) (cited in note 16), quoted in *Printz*, 117 S. Ct. at 2374. Relying on this language, Justice Souter in dissent also posited that state officials should be paid for their federal services. *Printz*, 117 S. Ct. at 2404. But the Federalist 36 passage in its entirety doesn't read as if “emoluments” were constitutionally required. In fact, Hamilton didn't seem to think the “spirit of influence” was serious enough to require special measures; he merely suggested a mechanism that could be used to deal with that spirit if it were found to be excessive.

54. See notes 42-43 and accompanying text.

## II. THE NATIONAL REVENUE POWER: WHY *NEW YORK v. UNITED STATES* SEEMS RIGHT

*New York v. United States* has some plausible history at its core. In this section we discuss the changes in the revenue structure made by the Constitution that seem to support the result in *New York*: the apparent repudiation of requisitions and the rejection of proposed amendments that would have explicitly preserved a place for requisitions in the new national government.

### A. THE NEED FOR A NEW REVENUE STRUCTURE

The Articles of Confederation were defective in many ways, but perhaps the primary defect was the national government's inability to raise revenue. The national government had no power to tax individuals directly; the revenue was supposed to come from the states.<sup>55</sup>

But the states weren't always forthcoming with funds. Part of the problem was that Congress had difficulty apportioning tax liability among the states,<sup>56</sup> but the real problems were the recalcitrance of the states and the powerlessness of the national government to enforce the requisitions. The requisitions weren't complete failures—Roger Brown has calculated a compliance rate of about 37 percent for the period between October 1781 and August 1786<sup>57</sup>—but that is clearly not good enough.

Serious modification of the Articles' revenue system was almost impossible; it would have required unanimous approval

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55. Article VIII of the Articles of Confederation provided that [a]ll charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall, from time to time, direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States, in Congress assembled.

56. The value of land in the various states was to be used for allocation, see *id.*, but few, if any, states had valued their lands, and it was only in 1783 that Congress asked for assessments. See Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution I*, 15 Pol. Sci. Q. 217, 218-19 (1900); see also *The Federalist* No. 21, at 143 (Hamilton) (cited in note 16) ("In every country it is a herculean task to obtain a valuation of the land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability.").

57. Roger H. Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* 12 (Johns Hopkins U. Press, 1993).

of the states.<sup>58</sup> A new constitution was therefore essential if the national government was to satisfy its basic financial needs, particularly during times of emergency like war. Alexander Hamilton was emphatic in *Federalist* 30: "What remedy can there be for this situation, but in a change of the system which has produced it—in a change in the fallacious and delusive system of quotas and requisitions?"<sup>59</sup> In many respects, invigorating the revenue system was the most important purpose of constitution-making. As Roger Brown has put it, "The experience with the breakdown of taxation . . . drove the constitutional Revolution of 1787."<sup>60</sup>

Invigorating the system was important, but it was not the whole story. An American generation that had fought British imperialism was not indifferent to the potential for abusive taxation, and few founders were willing to give the new government unlimited taxing power. The revenue power was a concern for two reasons—the effect on individuals subject to national taxes that could be onerous or discriminatory; and, perhaps more important, the effect on the states themselves, whose tax bases could be decimated by excessive national taxation.<sup>61</sup> The requisitions system under the Articles was relatively safe on both counts—indeed, it turned out to be too safe—because the states could temper the national power. If that revenue system was to be changed, the new system had to contain its own not-quite-so-effective safeguards.

As finalized, the Constitution implicitly divided taxes into two categories, direct and indirect, with nary a mention of requisitions. We will briefly describe these types of taxes because it helps to understand the revenue structure of the Constitution to see how different it was intended to be from the requisitions system that preceded it.

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58. See Articles of Confederation, Art. XIII.

59. *The Federalist* No. 30, at 189 (Hamilton) (cited in note 16).

60. Brown, *Redeeming the Republic* at 3 (cited in note 57).

61. In the first Congress, Elbridge Gerry referred to the "annihilation of the State Governments" that could result from national taxation. 1 *Annals of Cong.* 776 (Aug. 22, 1789) (Joseph Gales ed., 1834). Continued Gerry: "If [the states] discover a new source of revenue, after Congress shall have diverted all the old ones into their treasury, the rapacity of the General Government can take that from them also." *Id.* This was a common theme in debates on the Constitution. See, e.g., *Essays of Brutus*, N.Y. J. (Oct. 18, 1787), reprinted in 2 *The Complete Antifederalist* at 363, 366 (cited in note 42) ("When the foederal [sic.] government begins to exercise the right of taxation in all its parts, the legislatures of the several states will find it impossible to raise monies to support their governments.").

## 1. Indirect Taxes

The power to levy indirect taxes—generally duties, imposts, and excises<sup>62</sup>—was not radically new. The states had historically imposed such consumption taxes, and there had been a substantial push under the Articles of Confederation to grant the national government the power to levy imposts.<sup>63</sup> Even though many founders assumed that the national revenue system would consist of indirect taxes and little else—indirect taxes would satisfy all revenue needs except in times of war<sup>64</sup>—the founders generally did not view these taxes as oppressive.

Indirect taxes were generally palatable to both federalists and antifederalists because governments have no incentive to set rates too high.<sup>65</sup> If they do so, revenues will decrease as consumption declines—consumers can effectively decide whether to pay the taxes by deciding whether to buy the taxed goods<sup>66</sup>—and as evasive behavior increases. With the “nature of the thing” thus protecting against abuse,<sup>67</sup> constitutional draftsmen made indirect taxes subject to just one, relatively uncontroversial constitutional limitation—the uniformity rule.<sup>68</sup> As interpreted, that

62. See *The Federalist* No. 36, at 219 (Hamilton) (cited in note 16) (stating that by the term indirect taxes “must be understood duties and excises on articles of consumption”).

63. The move was stifled by the need for unanimity to modify the Articles. See Robert Middlekauff, *The Glorious Cause* 597-99 (Oxford U. Press, 1982).

64. At the Virginia ratifying convention, for example, James Madison emphasized that national defense requires the availability of extraordinary taxing powers, which would not be necessary to meet the day-to-day expenses of government:

When, therefore, direct taxes are not necessary, they will not be recurred to. It can be of little advantage to those in power to raise money in a manner oppressive to the people. . . . Direct taxes will only be recurred to for great purposes. . . . [I]t is necessary to establish funds for extraordinary exigencies, and to give this power to the general government; for the utter inutility of previous requisitions on the states is too well known.

3 *Debates* at 95-96 (June 6, 1788) (cited in note 36).

65. Indirect taxes are also often acceptable to taxpayers themselves because the taxes are hidden: purchasers of goods may not even realize that a tax is embedded in the purchase price. As Justice Cooley put it, “[T]his method enables the government, in the language of Turgot, ‘to pluck the goose without making it cry out.’ . . . [T]hose who pay do not perceive, or at least do not reflect, that a part of what they pay as price is really paid as a tax.” Thomas M. Cooley, *A Treatise on the Law of Taxation* 5 n.3 (Callaghan, 1876).

66. See *The Federalist* No. 21, at 142 (Hamilton) (cited in note 16) (“The amount to be contributed by each citizen will in a degree be at his own option . . .”).

67. As antifederalist Brutus explained, “[I]f [imposts] are laid higher than trade will bear, the merchants will cease importing, or smuggle their goods. We have therefore sufficient security, arising from the nature of the thing, against burdensome and intolerable impositions from this kind of tax.” *Essays of Brutus*, N.Y. J. (Dec. 13, 1787), reprinted in 2 *The Complete Antifederalist* at 388, 392-93 (cited in note 42).

68. “[A]ll Duties, Imposts and Excises shall be uniform throughout the United

rule simply requires geographical uniformity: the federal levies imposed in Georgia, for example, cannot differ from those imposed in New York.<sup>69</sup>

## 2. Direct Taxes

Direct taxes were thought to be much more dangerous. They were new; the most commonly discussed direct tax was on real estate, something that had not even been contemplated at the national level under the Articles. Unlike requisitions, direct taxes were to be imposed by the national government directly on individuals. And unlike indirect taxes, direct taxes were to hit the pocketbooks of affected individuals directly and painfully, with little or no way to avoid the taxes' impact. The antifederalist minority of the Convention of Pennsylvania described the fears of constitutional opponents: "The power of direct taxation applies to every individual, as congress, under this government, is expressly vested with the authority of laying a capitation or poll tax upon every person to any amount."<sup>70</sup> If unconstrained in their use, direct taxes could remove the states altogether from the national taxing process; direct taxes were seen as the antithesis of requisitions.

While almost everyone agreed that the national government needed a direct-tax power, if only to provide funds during emergencies when indirect-tax revenues might well decline,<sup>71</sup> most founders thought that a specific constitutional limitation with teeth was required to constrain the imposition of direct taxes. Even Alexander Hamilton, no friend of limits on the national taxing power, conceded that "[i]n a branch of taxation where no limits to the discretion of the government are to be found in the nature of the thing [i.e., direct taxation], the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large."<sup>72</sup>

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States." U.S. Const., Art. I, § 8, cl. 1.

69. See *Knowlton v. Moore*, 178 U.S. 41 (1900).

70. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pa. Packet & Daily Advertiser (Dec. 18, 1787), reprinted in 3 *The Complete Antifederalist* at 145, 162 (cited in note 42).

71. See 5 *Annals of Cong.* 842 (Apr. 1, 1796) (statement of House Ways and Means Chairman William Smith, in discussions that ultimately led to the first direct tax, that "[a]lmost the whole of the present revenue depends upon commerce—on a commerce liable to be deranged by wars in Europe, or at the will of any of the great naval European Powers").

72. *The Federalist* No. 21, at 143 (Hamilton) (cited in note 16).



The fixed rule accepted by the convention is found in the two clauses of the Constitution that require direct taxes to be apportioned among the states on the basis of population.<sup>73</sup> While the apportionment requirement arose as part of a compromise about how to count slaves for purposes of representation, it did have a substantive purpose: it clearly is a check on the congressional power to impose direct taxes. It makes the imposition of direct taxes difficult, and often impossible: imagine structuring a national real-property tax the effects of which depend on the populations of the states, rather than on respective values or acreages.<sup>74</sup> Like the requisitions system, the apportionment rule constrains the national government's power to destroy the states' own revenue systems by soaking up too much money. Indeed, one might see the apportionment rule as a substitute for the protections inherent in a not-very-well-policed system of requisitions.

If the direct-tax apportionment rule has turned out to be a paper tiger, and it has, it is because the term "direct taxes" has been defined extremely narrowly. With one arguably aberrant exception (the *Income Tax Cases* of 1895 invalidated a late-nineteenth century income tax, which led to the Sixteenth Amendment<sup>75</sup>), the term "direct taxes" has been interpreted to

73. See U.S. Const., Art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."); U.S. Const., Art. I, § 2, cl. 3:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

That provision still stands, modified only by the Fourteenth Amendment's elimination of the distinction between "free Persons" and "all other Persons," U.S. Const., amend. XIV, § 2, and the effective elimination of the category of "Indians not taxed" through legislation. See Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1994)).

The uniformity clause in the Constitution is generally inapplicable to direct taxes, if only because an apportioned tax necessarily must have different consequences in different states. See Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2341-42 (1997).

74. See William Draper Lewis, *The Constitutionality of the Income Tax*, 34 Am. L. Reg. & Rev. 189, 190 (1895) ("To declare an income tax, or any other tax, a direct tax, is equivalent to saying that Congress cannot pass such a tax without committing great inequality and injustice—practically, that Congress cannot tax the subject at all, except possibly in time of war . . .").

75. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (determining that an unapportioned tax on income from real estate was unconstitutional), *reh'g* 158 U.S. 601 (1895) (extending the same principle to income from personal property and concluding that an 1894 income-tax statute was unconstitutional in its entirety). The result in *Pollock* was effectively overturned by the Sixteenth Amendment. See U.S. Const., amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever

encompass only capitation taxes and taxes on real estate.<sup>76</sup> Almost all modern taxes have therefore been held to be indirect taxes immune from the apportionment requirement.<sup>77</sup>

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Whatever the proper scope of the direct-tax clauses<sup>78</sup>—wherever the line should be drawn between indirect and direct taxation—it does seem that those two categories exhausted the national government's revenue powers<sup>79</sup> and that requisitions therefore fell by the wayside at the Constitutional Convention. And there is further support for the proposition that requisitions were abolished by the Constitution: attempts to provide expressly for requisitions in the Constitution were unsuccessful.

#### B. THE FAILED ATTEMPTS TO INCORPORATE REQUISITIONS IN THE CONSTITUTION

The direct-tax apportionment rule is trivial only to the extent that the category of "direct taxes" is trivially narrow, but many antifederalists did not see things that way at all. Direct taxes were the tough new guys on the block. Though the direct-tax apportionment requirement was a step in the right direction,

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source derived, without apportionment among the several States, and without regard to any census or enumeration.").

76. That construction began almost immediately after the new government began. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796).

77. See Jensen, 97 Colum. L. Rev. at 2363-66, 2376-77 (cited in note 73). The primary effect of the direct-tax clauses has been in labelling: Congress has had every incentive to characterize levies as indirect, and therefore not subject to apportionment. Only a few explicitly direct taxes were ever imposed, on real estate and slaves, and none has been enacted since 1861. See Act of July 14, 1798, ch. 75, 1 Stat. 597; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164; Act of Feb. 27, 1815, ch. 60, 3 Stat. 216; Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; Act of Aug. 5, 1861, Ch. 45, 12 Stat. 294; *Springer v. United States*, 102 U.S. 586, 599 (1881) ("[W]henver the government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves."). Other taxes that might have run afoul of the apportionment rule have been denominated excises or duties, and the Supreme Court has been generous in deferring to congressional characterizations. For example, a tax on real property is a direct tax, but estate taxes were held to be excises on the *transfer* of property and therefore not subject to apportionment even if only real property is transferred. See *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1875); *Knowlton v. Moore*, 178 U.S. 41 (1900).

78. One of us has been trying to resuscitate these clauses. See generally Jensen, 97 Colum. L. Rev. (cited in note 73) (suggesting that the scope of the clauses is far broader than conventional wisdom suggests). Or perhaps the right word here is "suscite," since the clauses were gutted in 1796, with the Supreme Court's decision in *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796), and only temporarily revived by the *Income Tax Cases*.

79. We do not consider fees received for goods or services supplied by the national government—which are effectively value-for-value exchanges—to be encompassed by the revenue power.

thought many antifederalists, it did not suffice to protect the states' citizens and the states' tax bases against this new, possibly massive national power. The antifederalists therefore fought to retain the requisitions process in an adulterated form.<sup>80</sup>

At the Constitutional Convention, Luther Martin of Maryland proposed an amendment that, if accepted, would have done just that: requisitions would have been the normal first step in revenue-raising, with direct taxation available to the national government only as a backup. The requisitions process, that is, would have controlled unless a state was delinquent, at which point the national government could have taxed the state's citizens directly.<sup>81</sup> At the Maryland ratifying convention, Martin explained:

Many of the members, and myself in the number, thought that the *States* were much *better judges* of the circumstances of their citizens, and what sum of money could be collected from them by *direct taxation*, and of the manner in which it could be raised, with the *greatest ease* and *convenience* to their citizens, than the *general government* could be; and that the general government *ought not* to have the power of laying direct taxes in any case, but in that of the *delinquency* of a State.<sup>82</sup>

The uniformity rule in the Constitution was not sufficient protection against governmental overreaching,<sup>83</sup> argued Martin, because it did not prevent imposing duties, imposts, and excises in a way that was superficially uniform but that unfairly harmed states where certain types of property were concentrated.<sup>84</sup> For example, a superficially uniform tax on slaves would obviously have burdened only the southern states.

Martin's proposal was not adopted, of course, but the issue did not go away after the Philadelphia convention. For example, a group that called itself "A Minority of the Maryland Ratifying Convention," presumably reflecting Martin's influence, unsuccessfully asked that Maryland insist on the following constitutional amendment: "That, in every law of Congress imposing *di-*

80. See Herbert J. Storing, *What the Anti-Federalists Were For* 35 (U. of Chicago Press, 1981) ("[W]hile the system of requisitions secures the position of the states, it undermines that of the general government. Why not, then, many Anti-Federalists asked, make room in the system of revenue raising for both the national and the federal principles?").

81. See 2 *Records* at 359 (Aug. 21, 1787) (cited in note 12).

82. Luther Martin, *Mr. Martin's Information to the General Assembly of the State of Maryland* (1788), reprinted in 2 *The Complete Antifederalist* at 27, 55 (cited in note 42).

83. See note 68.

84. See Martin, *Mr. Martin's Information* at 56 (cited in note 82).

rect taxes, the collection thereof shall be suspended for a reasonable certain time therein limited, and on payment of the sum by any State, by the time appointed, such taxes shall not be collected."<sup>85</sup> And in 1789 the brand new House of Representatives considered a constitutional amendment that similarly would have provided that direct taxes could be levied only "where the moneys arising from the duties, imposts, and excise, are insufficient for the public exigencies, nor then until Congress shall have made a requisition upon the States to assess, levy, and pay their respective proportions of such requisitions."<sup>86</sup>

But the opponents of requisitions prevailed, and the Constitution was not amended. History was on the opponents' side—requisitions had not worked under the Articles—and there was serious concern about how they could ever be enforced. Alexander Hamilton's criticisms of requisitions, quoted in *New York v. United States*,<sup>87</sup> were representative of legitimate fears: how could a requisition to a recalcitrant state in the late eighteenth century be enforced without civil war?<sup>88</sup>

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We could stop here, with the national revenue power apparently serving as a grand example of the rightness of *New York v. United States*. Requisitions failed, the founders created

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85. See *Address of a Minority of the Maryland Ratifying Convention*, Md. Gazette (May 6, 1788), reprinted in 5 *The Complete Antifederalist* at 92, 97 (cited in note 42). The Virginia ratifying convention was also a hotbed of pro-requisitions sentiment. For example, the fiery Patrick Henry exclaimed: "For I will never give up the power of direct taxation, but for a scourge: I am willing to give it conditionally; that is, after non-compliance with requisitions . . ." *Speeches of Patrick Henry in the Virginia State Ratifying Convention* (June 5, 1788), reprinted in 5 *The Complete Antifederalist* at 211, 223 (cited in note 42). And George Mason concurred: "An indispensable amendment in this case, is, that Congress shall not exercise the power of raising direct taxes till the States shall have refused to comply with the requisitions of Congress." *Speech of George Mason in the Virginia State Ratifying Convention* (June 4, 1788), reprinted in 5 *The Complete Antifederalist* at 255, 259.

86. 1 *Annals of Cong.* 773 (Aug. 22, 1789) (Joseph Gales, ed. 1834).

87. See text accompanying note 37.

88. At the Virginia convention, Edmund Randolph stressed, "When gentlemen complain about the novelty [of direct taxes], they ought to advert to the singular one that must be the consequence of the requisitions—an army sent into your country to force you to comply." 3 *Debates* at 122 (June 7, 1788) (cited in note 36). Madison too warned about the consequences of a requisitions process with a strong national government that would have to enforce its levies against the states:

When [exercise of congressional power] comes in the form of a punishment, great clamors will be raised among the people against the government; hatred will be excited against it. . . . I conceive that every requisition that will be made on my part of America will kindle a contention between the delinquent member and the general government.

Id. at 251-52 (June 11, 1788).

an entirely new taxing system that kept its hands off the states, and that is the end of it. Or is it?

### III. WERE REQUISITIONS ABOLISHED?

It is clear that many of the founders did not view requisitions, which had worked so poorly under the Articles, as a generally useful way to raise revenue, and hardly anyone defended them as the only significant source of national funds. They unquestionably were not intended to play a central role in the constitutional republic. But that is not the same as saying that requisitions are impermissible. Not all principles are constitutional principles, and that is why *New York v. United States* may have been wrong in its history.

In all of the discussion in *Printz* about who could serve as collectors of federal taxes—whether the officials would be federal or state employees—the justices ignored a more fundamental point: if the national government can order a state to devise a system to collect billions of dollars, the tax collection questions discussed in *Printz* are so trivial that they are beside the point. And if *New York v. United States* was wrong in concluding that the national government could not compel states to participate in federal regulatory schemes, the *Printz* result, which depended on *New York*'s rightness, must be wrong as well.

In fact, many in the founding generation thought that requisitions survived ratification of the Constitution. For many antifederalists, survival of requisitions remained a fervent hope. The hope may seem to have defied logic, given the failure to obtain the sought-after constitutional language. But all that had been rejected in the fights about amending the Constitution was the use of requisitions as a mandatory prerequisite to invoking the direct-tax power.<sup>89</sup> There was no specific rejection of requisitions under all circumstances.<sup>90</sup>

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89. See notes 80-88 and accompanying text.

90. Some antifederalists hoped that the direct-tax apportionment rule itself might be interpreted as requisitions-in-disguise. For example, one of the Letters from the Federal Farmer discussed the relationship between the apportionment and the general taxing clauses:

By the first recited clause, direct taxes shall be apportioned on the states. This seems to favour the idea suggested by some sensible men and writers, that congress, as to direct taxes, will only have power to make requisitions, but the latter clause, power to lay and collect taxes, etc seems clearly to favour the contrary opinion and, in my mind, the true one, that congress shall have power to tax immediately individuals, without the intervention of the state legislatures . . . .

*Letters from the Federal Farmer* (Oct. 12, 1787), reprinted in 2 *The Complete Antifeder-*

It was not just the antifederalists who saw, or hoped for, continued life for requisitions. Although requisitions would no longer be (and should no longer be) the primary means of raising revenue, many supporters of the Constitution assumed that Congress retained the power to issue requisitions. And why not? The Constitution was intended to increase the national power at the expense of the states. Permitting the federal government to tax individuals directly, circumventing the states, added to the national power. Why assume that, at the same time national power over individuals was being increased under the Constitution, the founders meant to take away the powers that had existed, at least in theory, under the Articles of Confederation?

In Federalist 36, other parts of which were discussed in *Printz*, Alexander Hamilton, the most nationalistic of all nationalists, left no doubt that he thought Congress could issue requisitions under the Constitution—exactly the opposite of the position for which he was quoted in *New York v. United States*.<sup>91</sup> The critical passage is so important that it deserves to be quoted in full:

It has been very properly observed by different speakers and writers on the side of the Constitution that if the exercise of the power of internal taxation by the Union should be discovered on experiment to be really inconvenient, the federal government may then forbear the use of it, and have recourse to requisitions in its stead. By way of answer to this, it has been triumphantly asked, Why not in the first instance omit that ambiguous power and rely upon the latter resource? Two solid answers may be given. The first is that the actual exercise of that power if convenient, will be preferable because it will be more effectual; and it is impossible to prove in theory, or otherwise than by experiment, that it cannot be advantageously exercised. The contrary, indeed, appears most probable. *The second answer is that the existence of such a power in*

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alist at 245 (cited in note 42). But the Federal Farmer was realistic:

[I]n fact the first clause appears to me only to provide that each state shall pay a certain portion of the tax, and the latter to provide that congress shall have power to lay and collect taxes, that is to assess upon, and to collect of the individuals in the state, the state[']s quota . . .

Id. at 245-46.

91. See text accompanying note 37. We recognize that public figures' positions often change over time and that Hamilton, as promoter of the Constitution in *The Federalist*, sometimes emphasized limitations on national power that he later discounted when he was engaged in creating a strong national government. But precisely because he was a proponent of nationalism, we see no reason to think that he would have recanted his *Federalist* view that, as a constitutional matter, the states could be ordered to respond to requisitions.

*the Constitution will have a strong influence in giving efficacy to requisitions. When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part.*<sup>92</sup>

Should indirect and direct taxes be used only if and when requisitions failed, as antifederalists had argued? No, answered Hamilton, the country needed to give a try to new, more efficient forms of revenue-raising. But requisitions remained as a backup.

Federalist 36 by itself might not prove everything, of course, but the language there is much clearer and more definite than anything Justice Scalia could point to in *Printz* on the consensual arrangement point. And there is also some support in *The Federalist* for the idea that the direct-tax apportionment rule, although it did not mandate requisitions, was consistent with the continued use of a requisitions process. The census would determine each state's share of the total to be raised through direct taxation, and the federal government could give the order to each state for so many dollars. Each state could then decide how to satisfy that obligation—perhaps even deciding what and when to tax.<sup>93</sup>

Some of that evidence is in the passages discounted by the *Printz* majority, such as Hamilton's reference to the national legislature's making "use of the *system of each State within that State*."<sup>94</sup> Perhaps the most extensive description is found in Madison's Federalist 44 (also discussed in *Printz*). If a direct tax is imposed—unlikely but possible—the tax collectors will ordinarily be state officials because they will be collecting an amount

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92. *The Federalist* No. 36, at 220-21 (Hamilton) (cited in note 16) (emphasis added). The italicized language recognizes that the states might balk at complying with federal requisitions, but that language does not imply that the states would have a legal—as opposed to a political—choice about whether to fulfill a requisition.

93. Or, even more intrusively, Congress might decide what is to be taxed in each state. At the Virginia ratifying convention, for example, Edmund Randolph said:

Congress is only to say on what subject the tax is to be laid. It is a matter of very little consequence how it will be imposed, since it must be clearly laid on the most productive article in each particular state. . . . Were the tax laid on one uniform article through the Union, its operation would be oppressive on a considerable part of the people. When any sum is necessary for the general government, every state will immediately know its exact proportion of it, from the number of their people and representatives; nor can it be doubted that the tax will be laid on each state, in the manner that will best accommodate the people of such state, as thereby it will be raised with more facility; for an oppressive mode can never be so productive as the most easy for the people.

3 *Debates* at 121-22 (June 7, 1788) (cited in note 12).

94. *The Federalist* No. 36, at 220 (Hamilton) (cited in note 16).

equal to the state's direct-tax quota, just as was true under the requisitions system:

[I]t is probable that this power [of collecting internal as well as external taxes] will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the States to supply their quotas by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States.<sup>95</sup>

To be sure, Madison was not writing about a full-fledged requisitions system: the states as states would participate only if they elected to, and Madison assumed that the dollars involved would not exceed the states' already existing revenue capacities.<sup>96</sup> Nevertheless, the role Madison envisioned for the states in this federal revenue scheme, acting *under the immediate authority of the Union*, was much greater than the Court suggested was possible in either *New York* or *Printz*.

Perhaps the strongest evidence that requisitions survived under the Constitution, at least in the minds of many in the founding generation, is found in the debates leading to the enactment of the first direct-tax statute, ultimately passed in 1798. In a 1796 report on direct taxation, prepared at congressional request, Treasury Secretary Oliver Wolcott suggested three possible approaches: Congress could specify the objects of taxation; Congress could elect to tax whatever items the states were already taxing directly; or Congress could require the states to determine what to tax, make the actual collections, and turn over the appropriate amounts to the federal government.<sup>97</sup>

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95. *The Federalist* No. 44, at 292 (Madison) (cited in note 16). At the Virginia ratifying convention, in response to the suggestion that Congress ("ten men deputed from this state, and others in proportion from other states," 3 *Debates* at 253 (June 11, 1788) (cited in note 36)) would "not be able to adjust direct taxes, so as to accommodate the various citizens in thirteen states," *id.*, Madison answered, "Could not ten intelligent men, chosen from ten districts from this state, lay direct taxes on a few objects in the most judicious manner?" *Id.* at 253-54. And Congress could defer to those groups of intelligent men across the country: "If it should have a general power of taxation, they could select the most proper objects, and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to fix the proportion of each state, and they must raise it in the most convenient and satisfactory manner to the public." *Id.* at 255. (We admit to confusion about the antecedents of some pronouns in Madison's statement.)

96. Even in that case, however, the dollars taken by the federal government would restrict a state's capacity to undertake other projects.

97. 6 *Annals of Cong.* 2636, 2699 (Dec. 14, 1796) (reprinting Wolcott's report ["Wolcott Report"]; see David P. Currie, *The Constitution in Congress: The Federalist*



Different participants in the policy-making process had different views about the merits of each of Wolcott's possibilities, but none apparently saw constitutional constraints on any of the choices. Wolcott, for example, rejected reliance on state systems because of practical, not constitutional, considerations—it smacked too much of the ineffective system of requisitions<sup>98</sup>—but Representative Joseph B. Varnum of Massachusetts defended the practicality of such a method, obviously assuming the method's constitutionality.<sup>99</sup> While the House Ways and Means Committee finally recommended directly taxing land, improvements, and slaves under a national system—the form of direct taxation eventually adopted<sup>100</sup>—the Committee had originally proposed that the federal statute should incorporate state law,<sup>101</sup> and the full House initially accepted that proposal.<sup>102</sup>

After reviewing the legislative history of the 1798 direct-tax statute, David Currie concluded that no one saw “any constitutional impediment to laying taxes that differed from one state to another, or to delegating to the states authority to define and collect federal taxes.”<sup>103</sup> “Delegating” has a wishy-washy sound to it. We can restate the point in a way that ties the analysis to *New York v. United States*: no one saw a constitutional impediment to the national government's ordering the states to collect

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*Period, 1789-1801*, at 225 (U. of Chicago Press, 1997).

98. Wolcott Report at 2699 (cited in note 97) (“[I]t partakes of the system of requisitions . . . which utterly failed under the late Confederation, and to remedy which, was one great object of establishing the present Government.”).

It can be dangerous to rely too much on federalists' rationalizations for increasing national power in the first decade of the nation's existence. Hamilton, for one clear example, took much more expansive interpretations of constitutional power after the creation of the government than he had when writing as Publius. See Jensen, 97 *Colum. L. Rev.* at 2357-60 (cited in note 73). But in the first direct-tax debate it was not just the federalists who assumed that requisitions, or something like requisitions, remained possible under the Constitution.

99. See 6 *Annals of Cong.* 1882 (Jan. 16, 1797):

The several States being convinced that the authority of the General Government would be exercised if the money was not furnished by the time prefixed, they would in all probability make the remittance; but if any State should fail of doing it, this Government would make the assessment on the inhabitants of the delinquent States . . . .

100. 2 *Abridgement of the Debates of Congress, from 1789 to 1856*, at 265 (May 5, 1798) (D. Appleton and Co., 1857); see Act of July 14, 1798, ch. 75, 1 Stat. 597.

101. 5 *Annals of Cong.* 793 (Mar. 17, 1796) (recommending that the Secretary of the Treasury be directed to develop a direct-tax plan, “adapting the [plan] to such objects of direct taxation and such modes of collection as may appear, by the laws and practice of the States respectively, to be most eligible in each”).

102. *Id.* at 856 (Apr. 4, 1796) (adopting Committee recommendations with only minor modifications).

103. Currie, *The Constitution in Congress* at 225-26 (cited in note 97) (footnote omitted).

specified numbers of dollars. That is, no one saw a constitutional prohibition against ordering the states to play a central role in the national revenue system.

In 1813 it was still assumed that the states had a role to play. A short-lived wartime direct-tax statute enacted that year delegated significant responsibility to the states. The statute went so far as to apportion the tax liability throughout the United States on a county-by-county basis, but "each state may vary, by an act of its legislature, the respective quotas imposed by this act on its several counties or districts, so as more equally and equitably to apportion the tax."<sup>104</sup> Moreover, the statute provided that the states were to pay their quotas to the Treasury, with a discount of up to fifteen percent if a state made payment on a timely basis.<sup>105</sup>

In short, there is substantial evidence that the Constitution left intact the federal government's power to impose requisitions on the states. This evidence reflects the views of both supporters and opponents of ratification, and this understanding persisted beyond the time of the framing. Whether or not a system of requisitions is a good idea—and most founders thought not—it is not necessarily unconstitutional.<sup>106</sup>

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104. Act of Aug. 2, 1813, § 6, ch. 37, 3 Stat. 53, 71.

105. *Id.* § 7. The idea that the Constitution permits requisitions is not just ancient history; it survived well beyond the founding era. The Supreme Court's majority opinion in the second *Income Tax Case* in 1895, which held that an unapportioned income tax was unconstitutional, confirms that the states could play a role under a direct-tax regime. Chief Justice Melville Fuller wrote that, if a state wanted to serve as a buffer between the national government and its citizens, as Madison had suggested in Federalist 44, it could do so:

[The states] did not grant the power of direct taxation without regard to their own condition and resources as states; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of self-government.

*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 620-21 (1895); see also *id.* at 632-33. The states, that is, could decide whether to position themselves as intermediaries between the states' residents and the national direct-tax power that would otherwise extend directly to those residents.

Like James Madison in Federalist 44, see note 95 and accompanying text, Chief Justice Fuller described an arrangement that arguably falls short of ordering the states to create a specific regulatory scheme to further national mandates. But the Fuller opinion reminds us that the idea of requisitions, or something like requisitions, hadn't died a century after the ratification of the Constitution.

106. Further support for the constitutionality of requisitions can be found in Calvin H. Johnson, *The Foul-Up in the Core of the Constitution: Apportionment of Direct Taxes* (forthcoming).

We have demonstrated, we hope, that requisitions are constitutional, but we recognize that more must be said to connect that conclusion to the analysis in *New York* and *Printz*. The requisitions system did not make major demands on the states; indeed, it was because requisitions were so sensitive to state prerogatives that they did not work very well. Perhaps the constitutionality of requisitions therefore tells us little about the extent of national power under the Tenth Amendment. Justice Stevens may have been suggesting as much in his *Printz* dissent:

That method of governing [under the Articles] proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient. Indeed, a confederation that allows each of its members to determine the ways and means of complying with an overriding requisition is obviously more deferential to state sovereignty concerns than a national government that uses its own agents to impose its will directly on the citizenry.<sup>107</sup>

If Justice Stevens meant to discount the significance of requisitions for Tenth Amendment purposes—and we are not sure he meant to—he was wrong: he ignored the potential for requisitions to overwhelm state administrative systems and to affect state priorities.

Imagine a state receiving a requisition for several billion dollars. To satisfy the requisition, the state might well have to raise taxes (either by enacting a new taxing statute or by raising tax rates), and it might also have to increase the size of its enforcement staff. Alternatively, the state might choose to leave its tax system unchanged and simply spend less money on its own programs. But *New York* would treat the requisition as unconstitutional because it was a federal order for the states—and only the states—to act. Although the requisition might give the state some latitude in *how* to comply, it precludes the state from deciding *not* to comply.

Moreover, the requisition compels the state's tax collectors to devote their time and energy to obtaining revenue on behalf of the federal government rather than on behalf of the state. This would, as the *New York* Court emphasized, undermine the accountability of both state and federal officials. The state government would be mistakenly blamed for its high taxes by confused voters who did not realize that some of their tax payments were being sent on to Washington to satisfy the requisition, and the federal government would be insulated from criticism be-

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107. *Printz*, 117 S. Ct. at 2389 (Stevens, dissenting). Since he was not facing the question directly, it is hard to be sure whether Stevens was assuming the constitutionality of requisitions. But this passage is consistent with an assumption of constitutionality.

cause taxpayers would not realize how much revenue Washington was actually receiving.<sup>108</sup>

Could one seriously argue that imposing routine obligations on local sheriffs, the burden at issue in *Printz*, is constitutionally impermissible while ordering a state to come up with so many billions of dollars is not? What would be the constitutional sense of such a distinction?

### CONCLUSION

We do not intend this essay to be a defense of original understanding in constitutional interpretation; indeed, the authors have somewhat different views on the merits of that subject. Our position is much narrower: if courts use an original-understanding interpretive theory, they need to get that understanding as close to right as possible. But in *New York v. United States*, the Court, on originalist premises, elevated the founders' quite defensible rule of prudence—that the federal government ought not to be compelling state governments to discharge federal obligations—to a general constitutional principle. And in *Printz v. United States*, the Court compounded the error by extending that principle from state legislatures to state executives. We think the evidence about the requisition power calls into question the originalist premises underlying the Court's current approach to the Tenth Amendment.

Although *New York* and *Printz* are unpersuasive on originalist grounds, their anti-commandeering principle might be justified on the basis of an alternative approach to constitutional interpretation.<sup>109</sup> But the Court has not yet offered such an explanation. The available evidence suggests that the Constitution did not necessarily forbid federal compulsion of state governments. It is not likely to happen, but the national government has the power today to compel the states to participate in a national revenue system.

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108. See *New York*, 505 U.S. at 168-69.

109. See, e.g., H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 681-88 (1993).